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Nos. 85-1386 and 85-1391

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIS WALTER HOLLOWAY, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES D. SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that their indictment should have been dismissed due to prosecutorial misconduct and that they were entitled to an evidentiary hearing in which to establish that claim. In addition, petitioner Sullivan asserts that, as a state court judge, he was immunized from prosecution under the Tenth Amendment.

1. Following a jury trial in the United States District Court for the Southern District of Alabama, petitioners were convicted on charges of racketeering and conspiracy,

in violation of 18 U.S.C. 1962(c) and (d). Petitioner Holloway was also convicted on one count of violating the Travel Act, 18 U.S.C. 1952, and on one count of wire fraud, in violation of 18 U.S.C. 1343. Both petitioners were sentenced to concurrent terms of 20 years' imprisonment on the racketeering and conspiracy counts. In addition, petitioner Sullivan was fined $5000 on those counts. Petitioner Holloway was sentenced to concurrent five-year terms of imprisonment on the two wire fraud and Travel Act counts; those sentences were made concurrent with the 20-year term imposed against Holloway under the other counts. The court of appeals affirmed (Pet. App. 1a-24a).[1]

The evidence at trial, which the court of appeals found "overwhelming" (Pet. App. 3a), established that petitioners and four co-defendants solicited and collected bribes from Alabama state court defendants who, in return, were accorded favorable treatment by petitioner Sullivan and co-defendant Hogan, both of whom served as state judges. Before trial, petitioners moved to dismiss the indictment, contending that government agents had threatened and harassed several prospective grand jury witnesses. In support, they furnished affidavits from five such persons, four of whom stated that they had been contacted by FBI agents (Pet. App. 10a-15a).[2] The four declared that they were warned that the FBI possessed information linking them to the bribery scheme and that they would be indicted unless they cooperated in the investigation. Three affiants actually appeared before the grand jury, but none of the three claimed that the FBI's purported threats induced them to

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[1]"Pet. App." refers to the petition appendix in No. 85-1386.

[2]A fifth affiant, who was one of the defendants at trial, "made no mention [in his affidavit] of any threat by the FBI or any other investigator" (Pet. App. 11a-12a).

testify falsely (Pet. App. 12a-15a). The district court subsequently denied petitioners' motions to dismiss the indictment, refusing to conduct an evidentiary hearing.

2. The court of appeals affirmed petitioners' convictions, rejecting their contention that the district court erred in refusing either to dismiss the indictment or to conduct an evidentiary hearing. The court of appeals found "no showing of prosecutorial misconduct in this case" (Pet. App. 22a), noting further "that not a single prospective witness before the grand jury contended in his or her affidavit that the so-called 'threats' by the government officials had caused him to testify falsely before that body" (*id.* at 15a-16a).[3] The court also rejected petitioners' suggestion that it was improper for the government to advise potential grand jury witnesses that they might be prosecuted if they refused to testify. To the contrary, the court of appeals noted that it is "self evident" that "so long as it is made known to a defendant in the criminal prosecution, the government may agree not to prosecute a prospective witness if he or she agrees to testify 'for' the government" (Pet. App. 19a, citing *Giglio* v. *United States*, 405 U.S. 150 (1972)).

The court of appeals also ruled that the district court was correct in refusing to conduct an evidentiary hearing on petitioners' claim of prosecutorial misconduct. The court recognized that a hearing would have been warranted only if petitioners had raised a material issue of fact that, if resolved in their favor, would have entitled them to relief (Pet. App. 21a). See *United States* v. *Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980). The court of appeals determined that petitioners had failed to demonstrate any need for such a hearing (Pet. App. 22a).

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[3]As the court observed, "the affidavits contained statements that are largely conclusory" (Pet. App. 16a). They provide little information concerning the alleged threats and do not even provide "an actual quotation of the statements made to the prospective witnesses" (*ibid.*).

3. Petitioners renew their contentions that they were the victims of governmental misconduct warranting dismissal of their indictment and that they were entitled to an evidentiary hearing. These contentions are meritless.

In this Court, petitioners simply repeat their conclusional allegations that the FBI agents impermissibly threatened potential grand jury witnesses and that their indictment should accordingly have been dismissed.[4] They cite this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), as well as such cases as *United States* v. *Goodwin*, 625 F.2d 693 (5th Cir. 1980), and *United States* v. *Serubo*, 604 F.2d 807 (3d Cir. 1979). But those cases have nothing whatever to do with the situation posed here. In *Morrison*, for instance, this Court refused to sanction the dismissal of an indictment with prejudice, even assuming the existence of a violation of the defendant's Sixth Amendment right to counsel, because the defendant "demonstrated no prejudice of any kind, either transitory or permanent." 449 U.S. at 366.[5] Here, petitioners do not allege that their Sixth

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[4]While petitioners generally dispute the ultimate conclusion of the court of appeals—namely, that the prosecution was not guilty of any misconduct warranting dismissal of the indictment—they do not take issue with any of the subsidiary findings upon which the appellate court based its ultimate conclusion. Neither petitioner, for instance, disputes the lower court's finding that no prospective grand jury witness was actually coerced by threats of prosecution into testifying falsely. Similarly, neither takes issue with the appellate court's holding that the affiants failed to describe the prosecution's purported threats with sufficient specificity to support an allegation of misconduct. Finally, petitioners fail to dispute the conclusion of the court of appeals that the government is free, in the exercise of its prosecutorial discretion, to refrain from prosecuting those who cooperate in criminal investigations.

[5]Petitioner Holloway's suggestion (Pet. 14) that he need not show that he was prejudiced by any purported misconduct in order for the indictment to have been dismissed is accordingly baseless. See also *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986).

Amendment rights to counsel were infringed, and they appear to concede that they were not prejudiced by the misconduct they contend was perpetrated by the prosecution.

Goodwin and *Serubo* are of no greater aid to petitioners. In *Goodwin*, the court of appeals reversed the defendants' convictions because, inter alia, the defendants furnished specific evidence that government officials had intimidated two prospective defense witnesses into refusing to testify. 625 F.2d at 702-703. Here, by contrast, the court of appeals rejected petitioners' motion to dismiss the indictment precisely because petitioners not only failed to present any evidence of intimidation with the requisite specificity, but also because they were unable to establish that any prospective grand jury witness was in fact intimidated into testifying falsely. In *Serubo*, the prosecution questioned grand jury witnesses in an " 'improper, reprehensible, and unacceptable' " fashion (604 F.2d at 814 (citation omitted)) by attempting, without any evidentiary foundation, to link the defendants with organized crime and by commenting on the veracity of absent witnesses (*id.* at 815). In the instant case, however, petitioners point to no evidence that any witness was improperly questioned or that the grand jury was in any way misled by the prosecutors. Under these circumstances, the court of appeals correctly concluded that petitioners were not entitled to have their indictment dismissed and that there was no need for the district court to conduct an evidentiary hearing.

4. Petitioner Sullivan, a state court judge, also asserts (Pet. 19-25) that the Tenth Amendment bars the federal prosecution of state judical officers. This contention is frivolous. The Tenth Amendment does not give state court judges any special immunity from federal criminal prosecution.

The Tenth Amendment provides that powers not delegated to the United States by the Constitution, nor prohibited by it to the states "are reserved to the states respectively, or to the people." Thus, the states retain the authority to create "judicial systems for the decision of legal controversies." *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285 (1970). But the Tenth Amendment does not provide special privileges to individual state court judges who, like all other citizens, remain subject to federal criminal law.[6] Nothing in the Tenth Amendment prohibits the federal government from enforcing federal racketeering laws against state officials who engage in illegal conduct. See *United States* v. *Thompson*, 685 F.2d 993, 1000-1002 (6th Cir.), cert. denied, 459 U.S. 1072 (1982).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[6]Petitioner details at great length Alabama's procedure for "disciplining * * * and remov[ing] Judges from office" (85-1391 Pet. 23) and suggests that prosecuting him for racketeering is therefore "destructive of [Alabama] State sovereignty" (*id.* at 24). But the federal government's prosecution of petitioner for racketeering does not intrude at all upon Alabama's independent authority to maintain and regulate its state judiciary. See *United States* v. *Gillock*, 445 U.S. 360, 371 (1980) ("the regulation by Congress under the Commerce Clause of individuals is quite different from legislation which directly regulates the internal functions of states"). A federal racketeering conviction, which may induce Alabama to consider exercising its "authority to discipline Judges and remove them from office" (85-1391 Pet. 23), is by no means a substitute for or limitation on that authority.